No. 12,594

IN THE

United States Court of Appeals

For the Ninth Circuit

TUCSON GAS, ELECTRIC LIGHT AND POWER COMPANY, a Corporation,
and
THE INDUSTRIAL COMMISSION OF ARIZONA, a Public Agency,
Intervenors-Appellants,
vs.
JOHN E. HUBBELL and WILMA HUBBELL,
Appellees.

PETITION OR MOTION FOR A REHEARING.

H. S. McCLUSKEY,
Arizona State Building, 1640 West Adams Street, Phoenix, Arizona,
Attorney for Intervenors-Appellants.

ROBERT E. YOUNT,
Of Counsel.

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To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Come now intervenors-appellants, by their undersigned attorney, and pursuant to Rule 25 of the Rules of the United States Court of Appeals for the Ninth Circuit, and move the Court for a rehearing on its decision of March 14, 1951, in the above-entitled matter, and, without waiving, and continuing to rely upon our primary assignments, on the grounds following:

(a) That the Court erred in the premises in holding that, under the evidence and the law, Sanderson & Porter are independent contractors.

(1) The Court holds that the trial court "under the contract and the surrounding circumstances and evidence would support a finding either way".

(b) That if there was a conflict in the evidence on the status of independent contractor—which intervenors-appellants can not find, and the opinion of the Court points out no such conflict—then under the law of Arizona the determination of the conflict was for the jury as contended by the defendant Porter et al., and such issue is jurisdictional.

(c) The Court, in determining the issue of "election of remedy" on the basis of a general provision of the Constitution (Article XVIII, Section 6) failed to give effect:

(1) to the special and qualifying provisions of Article XVIII, Section 8, as amended;

(2) to the provisions of the workmen's compensation statute; and,

(3) to the Rules of the Commission (70-76, inc.) relating to election of remedies;

with which appellee was charged with the duty to know as a matter of law.

(d) The Court failed to pass upon the jurisdictional question that the award was *res adjudicata,* unless set aside on certiorari by the Supreme Court in the manner provided by the Arizona statute.

ARGUMENT ON ASSIGNMENTS OF ERROR NOS. (a) AND (b).

We respectfully contend that the assignments speak for themselves and that argument thereon would be redundant.

We respectfully contend that the decision fails to meet the issues tendered, in essential particulars. And, in the absence of a clear declaration as to whether the evidence is in conflict—which may be inferred from the decision—the opinion is ambiguous, and its reasoning is neither persuasive nor compelling, especially as the primary authority relied on, *Johnsen v. American-Hawaiian Steamship Co.,* 98 F. (2d) 847, 9th Cir. 1938, is foundationed on a premise of overreaching the plaintiff. There is no such evidence here.

As long as the decision leaves the issue in a twilight zone, no clear-cut conclusion is possible. Under all the facts, we, with the utmost respect, contend that the respective litigants are entitled to have these issues determined. It remains our view that there was no essential conflict in the evidence either on the employment status of Sanderson and Porter; or, on the matter of the Election of Remedies. The self-serving plea is not lack of knowledge but of "full" knowledge. We contend this is not the rule in Arizona.

ARGUMENT ON ASSIGNMENT OF ERROR (c).

It is the rule in Arizona in relation to constitutional and statutory construction that effect must be given to the whole of a section or chapter, and that special

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provisions control those that are geenral; *Home Owners Loan Corp. v. City of Phoenix,* 51 Ariz. 455, 77 P. (2d) 818; *State v. Lumbermen's Indemnity Exchange,* 24 Ariz. 306, 209 P. 294; and that when they are *in pari materia* they should be construed together so as to give effect to each if possible.

Sections 3 and 6 of Article XVIII of the Constitution deals with the subject of damages generally. These sections are modified by Section 8, as amended, which deals specially with proceedings for compensation or actions for damages "for injuries which arise out of and in the course of employment", and which include injuries caused by a third party.

As we read the decision, the Court failed to give effect to the election by appellee to abide the compensation law when he failed to reject its provisions in the manner provided by Sections 56-944 and 56-945, and made it his exclusive remedy under Section 56-946, including the election to make it his exclusive remedy against third parties under Sections 56-949 and 56-950, unless he made his election in the manner provided by the latter two sections and the rules of the Commission adopted in relation thereto, Rules 70-76, inclusive, which the Commission was empowered to adopt under the provisions of the statute.

Appellee was charged with knowledge of, and the duty to know, the provisions of the statute, and of these rules at the time he elected to be bound thereby under the provisions of Sections 56-944 to 56-946, 56-949, 56-950; *S. H. Kress Co. v. Superior Court,* 66

Ariz. 67, 182 P. (2d) 931. One of the primary purposes of the statute, and of these rules, is to expedite the payment of compensation benefits; and the statute unequivocally provides that "one who makes application for an award * * * waives any right to exercise any option to institute proceedings in any court".

There is no qualifying language in Sections 56-949 or 56-950 with reference to knowledge. The statute implies that when the appellee made his election to accept the compensation law he had knowledge of the law and the rules of the Commission and his rights thereunder. He was under notice of that effect, Section 56-944. *S. H. Kress Co. v. Superior Court,* supra.

The Court has wholly failed to give effect to the intent and purpose of the Act to expedite the early payment of claims and to eliminate, insofar as practicable where matters involving injuries by accident arising out of or in the course of employment are concerned, private litigation, and the regulation of medical and hospital fees, etc. (56-966). The Court, under the facts, in our opinion, gives undue weight to the interpretation of the word "election", and fails to even mention the rules of the Commission, which have been of long standing, interpreting the same. It is true, in the absence of an interpretation hereof by the Supreme Court of Arizona these particular rules are not binding on this Court, but they merit great weight. *Federal Land Bank of Berkeley v. Warner,* 54 S. Ct. 571, 292 U.S. 53, 78 L. Ed. 1120, 91 A.L.R. 380, reversing (1933) 23 P. (2d) 563, 42 Ariz. 201;

Copper Queen Consolidated Co. v. Territorial Board of Equalization, 84 P. 511, 9 Ariz. 383, affirmed 1907, 27 S. Ct. 695, 206 U.S. 474, 51 L. Ed. 1143. And the rules generally have been approved by the Court, *Guy F. Atkinson Co. v. Kinsey,* 61 Ariz. 127, 144 P. (2d) 547; *Smith v. Ind. Com.,* 65 Ariz. 43, 173 P. (2d) 753; and are held to have the force and effect of statutes.

We respectfully contend that the rules of the Commission are entitled to greater weight than mere meretricious verbiage, which in the language and the popular song of the day, amounts in effect to "I Didn't Know the Gun Was Loaded".

We repeat the decision is silent on these rules, and is contrary to the express language of the statute that "one who makes application for an award" is bound thereby (56-950).

ARGUMENT ON ASSIGNMENT OF ERROR NO. (d).

We refer to intervenors-appellants' reply brief, pages 19, 20.

The principles of *res judicata* apply to questions of jurisdiction as well as to other issues, and as well to jurisdiction of the subject matter as of the parties. *Johnson v. Muelberger,* 71 S. Ct. 474, Advance Sheet No. 9.

It is respectfully submitted, therefore, that, upon the present state of the record, the Court in the judg-

ment of counsel is in error and the case should be reversed.

Dated, Phoenix, Arizona,
April 2, 1951.

Respectfully submitted,
H. S. McCluskey,
Attorney for Intervenors-Appellants.

Robert E. Yount,
Of Counsel.

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CERTIFICATE OF COUNSEL IN SUPPORT OF PETITION OR MOTION FOR REHEARING.

State of Arizona,
County of Maricopa.—ss.

H. S. MCCLUSKEY, Attorney of Record in the aforeentitled action, herein and hereby certifies: that he has read the aforegoing Motion for Rehearing and the evidence in support thereof, and in his judgment the

Motion is well-founded; that it goes to the merits of the litigation, and is not interposed for delay.

Dated, Phoenix, Arizona,
April 2, 1951.

H. S. McCluskey,

AUTHORITY.

Rule 25, Rules of the Circuit Court of Appeals, Ninth Circuit, O'Brien's Manual, Supplement No. 4, page 18.